No. 10-797

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2010

T. FELKNER, *Petitioner*,

v.

STEVEN FRANK JACKSON, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION
TO STATE'S PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether in an unpublished decision that is has no precedential value, the Ninth Circuit correctly and adequately decided that under the unique facts of this case, and based in part on the factual comparisons of comparative juror analysis, the state court decision was contrary to, or involved an unreasonable application of, clearly established Federal law because the prosecutor's proffered race-neutral bases for peremptorily striking two African-American jurors were not sufficient to counter the evidence of purposeful discrimination in light of the fact that two out of [a possible] three prospective African-American jurors were stricken, and the record reflected [factually] different treatment of comparably situated jurors.

2. Whether any of the justifications for granting certiorari under Supreme Court Rule 10 or other authorities applies in the case at bar.

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I. PRAYER FOR RELIEF

Respondent Steven Frank Jackson respectfully asks that the State's petition for a writ of certiorari to the U. S. Court of Appeals for the Ninth Circuit be denied. The basis of the denial of this petition is that the Ninth Circuit in an unpublished opinion that has no precedential value correctly and adequately decided that under the unique facts of this case, and based in part on the factual comparisons of comparative juror analysis, that the state court decision was contrary to, or involved an unreasonable application of, clearly established Federal law because the prosecutor's proffered race-neutral bases for peremptorily striking two African-American jurors were not sufficient to counter the evidence of purposeful discrimination in light of the fact that two out of [a possible] three prospective African American jurors were stricken, and the record reflected [factually] different treatment of comparably situated jurors.

In addition, as discussed at greater length below, *none* of the considerations that support granting the writ listed in Supreme Court Rule 10 or any other authority exists.

II. OPINION BELOW

On July 23, 2010, a *unanimous* three judge Ninth Circuit panel entered judgment in an order that was final and *unreported*, reversing and remanding the district court's denial of Mr. Jackson's habeas petition. *Steven Frank Jackson v. T. Felkner*, No. 09-15379 (9th Cir. July 23, 2010), *Appendix A.*

As noted in the first footnote of the unreported opinion, "*[t]his disposition is*

not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3." (emphasis added). Ninth Circuit Rule 36-3, in turn provides as follows:

> (a) Not Precedent. *Unpublished dispositions and orders of this Court are not precedent*, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion.

Appendix A at 1 (emphasis added). The state court decisions below are also unreported.

The State subsequently sought panel rehearing and rehearing en banc. On September 3, 2010, the Ninth Circuit issued an Order stating that the panel had unanimously agreed to deny panel rehearing, and that "[t]he full court has been advised of the Suggestion for Rehearing En Banc, and ***no judge of the court*** has requested a vote." *Appendix B* (emphasis added). Both petitions were denied. *Id.*

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 9 of the United States Constitution provides in pertinent part:

> The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be...deprived of life, liberty, or property, without due process of law....

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

IV. STATEMENT OF THE CASE

A. Facts Material to the Questions Presented

Facts Of The Underlying Case

This is a case of an African American man who was sentenced to a determinate state prison sentence of 10 years plus an indeterminate sentence of 300 years to life for allegedly raping a white woman.

The alleged victim was an elderly white woman who lived alone. At about 4:20 in the morning, an African American man allegedly entered her apartment through a window, pretended that a piece of wood he had was a gun, and raped her. Although the alleged victim spent about an hour at close quarters with her assailant and there was light coming into the bedroom from the porch light at the time, she was unable to positively identify Mr. Jackson as her assailant in a photo lineup, at the preliminary hearing, or at trial, and in fact at one point she identified another man as her likely assailant. *See, e.g.,* RT 92-251.

The evidence at trial consisted mostly of evidence that Mr. Jackson's DNA was found on the alleged victim's breast, which was hotly contested by a defense attorney who specialized in DNA evidence, plus evidence that Mr. Jackson had allegedly attempted to commit an unrelated sexual crime 20 years earlier.

The prosecution broke down the sexual assault into ten separate counts of rape (one for each presumed penile penetration, based on the victim's best guess), one for each alleged digital penetration, one for forcible oral copulation, and one for sexual battery, all based on the same incident. Mr. Jackson was convicted by the

jury on all counts, and based on that plus his prior convictions, he was sentenced under California's "three strikes" law to mostly consecutive prison terms totaling 310 years to life. ER 3-4.

Facts Relating To The *Batson* Claim

As noted above, in this case an African American man was charged with raping an elderly white woman. CT 11-25. The trial court recognized that race was an issue, telling prospective jurors that "the complaining witness and the defendant are from different racial backgrounds." ART 55. The Court also recognized that "it is apparent that the defendant has a different racial background than many of the jurors." ART 55. However, there were two African American jurors in the jury panel: Darrell Smith and Lola Johnson. ER 50-51. During voir dire, the prosecutor peremptorily dismissed both of them. ART 103, 200.

The trial court questioned prospective jurors on their attitudes and experiences regarding both race and police:

> "Have any of you had any negative encounters with law enforcement? This wouldn't necessarily relate to the racial issue, but negative encounters with law enforcement as that it left a negative impression in your mind? This could be something as simple a traffic ticket where you felt you were unfairly treated."

ER 59-60. Two prospective jurors felt they had been treated unfairly by police: Darrell Smith and Juror 8. Mr. Smith is African American. ER 59-60. He explained that between the ages of 16 and 30 he had been stopped by police "a lot" because of his race and age. ER 60-61. He indicated, however, that none of these experiences "stuck out in [his] mind" and that it was not a "big thing." ER 61. He

also indicated that there was nothing that caused him to think he couldn't be a fair juror to both sides. ART 59-60.

Mr. Smith also explained that it had been over 20 years since he had last been stopped by police. ER 65. Now, Mr. Smith had "a lot of friends and former students . . . in law enforcement," and he regularly socialized with retired police officers. ER 56-58, 66. He also told the prosecutor that he did not "judge all police officers by the behavior of one" and that he was "willing to judge each [witness] on their own credibility." ER 66. He did *not* indicate when asked that he would be biased or prejudiced in any way, or unable to give Mr. Jackson or the State a fair trial. See ART 11-12. In spite of these answers, the prosecutor used a peremptory challenge to kick Mr. Smith off the jury. ART 103; CT 113.

Prospective Juror 8, who was not African American, had also had several negative experiences with police. Juror 8 explained that during a trip to Illinois, he/she had been stopped by police, who asked Juror 8 for $80.00 not to give him or her a ticket. ER 59-60. Juror 8 believed it was a scam because Juror 8 was driving a car with California license plates, and felt discriminated against for being a Californian. Id. When the trial court asked Juror 8 whether he/she could "set aside that experience," he/she replied "I'm not mad anymore. It's okay." Id.

Juror 8 also told the court that he/she was the victim of a burglary. ART 26, ER 62-63. The police refused to investigate because there were no witnesses and the value of the property stolen was below $1,000. ART 27, ER 63. This made Juror 8 "damn mad." ER 63. Juror 8 was "disappointed [in the police] but . . . got

over it." Id. The prosecutor did not discharge Juror 8, and he or she sat on the jury. CT 113, 115.

In short, both Mr. Smith and Juror 8 were questioned about their contacts with law enforcement. Both explained that they had several negative experiences with police officers in their pasts, and both thought that they had been discriminated against by those police officers, but both also said that those experiences would not affect their ability to fairly decide the case. ER 59-61, 63, 66. The prosecutor struck prospective juror Mr. Smith but allowed Juror 8 to remain on the jury; the only real difference between them was that Mr. Smith was African American and Juror 8 was not. CT 113.

The trial court also questioned prospective jurors about their education and occupation. Several jurors who were not African American had backgrounds that led to more probing questioning. For example, after several prospective jurors said they were attorneys, the prosecutor asked questions designed to ensure that they would follow the law as given to them and not use any outside legal knowledge or resources. ART 196-199. One juror who was not African American said he had a background in science and statistics, and because the case would involve hotly contested DNA evidence, the prosecutor asked questions which ensured that the juror would decide the case based only on the evidence presented. ART 174-175.

When the trial court questioned prospective juror Lola Johnson, an African American, she explained that she worked in property management and had lived in the Greenhaven area for the last 18 years. ER 67. She also explained that in 1992,

while working on a graduate degree in social work, she had completed a 9-month internship in the psychiatric department (presumably of the county jail). ER 50-54, 67. Ms. Johnson told the court that nothing about this experience, however, would "reflect on [her] ability to be a fair juror." ER 68.

The prosecutor asked probing questions of non-African American jurors to determine if there was a problem with their educational background. See ART 174-175, 196-199. However, the prosecutor did not ask Ms. Johnson a single question about her educational background, about her social work degree, or about her internship (presumably) at the county jail. ART 177-200. In fact, Ms. Johnson did not raise her hand when asked if she would not vote guilty if the case were proved to her beyond a reasonable doubt. ATT 199. Instead, the prosecutor used a peremptory challenge to dismiss her. ART 200.

Defense counsel made a motion under Batson v. Kentucky, 476 U.S. 79 (1986), pointing out that Mr. Smith and Ms. Johnson were both African American. ER 50-51. The trial court required the prosecutor to respond. ER 51.

The prosecutor said that he was concerned that Mr. Smith may "still harbor animosity" toward police because of his "history with law enforcement . . . [stopping] him for no reason." ER 52. Moreover, the prosecutor had passed twice on the jury when Mr. Smith was in the jury box and had defense counsel also passed Mr. Smith would have been on the jury—which the prosecutor apparently considered undesirable. ER 51.

This explanation was clearly pretextual. It had been over 20 years since Mr. Smith had been stopped by police and he now regularly socialized with retired police and sheriffs' officers. ER 56-57. 66. Several of his good friends and former students were in law enforcement. ER 66. And Mr. Smith indicated that his history with police would not affect his ability to be fair and assess the credibility of witnesses on an individual basis. ER 58, 60-61, 66. Moreover, Juror 8 -- who was not African-American -- had also had several negative experiences with police. ER 60, 62-63. Yet the prosecutor did not dismiss Juror 8 for this identical reason and Juror 8 ultimately sat on the jury.

As to Ms. Johnson, the prosecutor stated that he challenged her "based on her educational background . . . in social work." ER 52. As noted above, the prosecutor had not asked Ms. Johnson a single question about her degree in social work, or whether it would it would affect her ability to be a fair juror in this case. ER 67-68, ART 188-200. Moreover, Ms. Johnson had apparently not even pursued a career in social work and instead now worked in property management. ER 51, 53, 67. However, there were several non-African American jurors who also had backgrounds which concerned the prosecutor. As noted above, the prosecutor asked these jurors further questions to learn how their background would affect their ability to decide the case. ART 174-175, 196-99. The prosecutor, however, did *not* treat Ms. Johnson this same way.

The trial court denied defense counsel's *Batson* motion. ER 54. Mentioning only the prosecutor's proffered reason for dismissing Ms. Johnson, the court found

that because the prosecutor "mentioned that social worker degree, which has absolutely nothing to do with her race, I am going to deny the *Wheeler[/Batson]* motion." ER 54.[1]

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1 The parties below disagreed on whether these two were the only African American prospective jurors, or whether a third African American actually sat on the jury. The record does not clearly reflect the correct answer, but the state courts inferred that a third African American did sit on the jury because during voir dire (before jury selection was completed), the judge referred to another juror whose name was redacted, which would be a common thing for court reporters to do with sitting jurors. See ER 51. This single word in the transcript is hardly conclusive evidence of a third African American juror actually ultimately sitting, however. Moreover, it is unconstitutional to exclude even one juror based on race, regardless of whether others of the same race ultimately sit on the jury. *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994); *United States v. Battle*, 836 F.2d 1084, 1086 (8th Cir. 1987); *United States v. Gordon*, 817 F.2d 1538, 1541 (11th Cir. 1987). At oral argument, counsel discussed and the Panel recognized this factual dispute, but apparently chose to give the government the benefit of the doubt in its written opinion. This note is pursuant to Supreme Court Rule 15.2, which states:

> In addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition. Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition.

Undersigned counsel hereby considers the State's repeated statements that the prosecutor "accepted the jury with the third African-American juror in the box" or that "two out of three" African American jurors were stricken or did not serve to be misstatements, while recognizing that the Panel gave the State the benefit of the doubt in its unpublished written ruling.

Similarly, Respondent considers it a "misstatement" within the meaning of Supreme Court Rule 15.2 when the State at page 4 of its Petition argues that "[d]efense counsel did not take issue with the prosecutor's stated reason for challenging Mr. S." Defense counsel mentioned both struck jurors in his *Batson/Wheeler* motion, the trial court addressed them both, and the trial

The California Court of Appeal denied this *Batson* claim on direct review, opining in a very conclusory way that "Juror 8's negative experience out of state and the car burglary is not comparable to juror [Smith's] 14 years of perceived harassment by law enforcement based in part on race." ER 32. Similarly, the California Court of Appeal opined that prospective juror Johnson's "educational background in social work is simply not comparable to the jurors with backgrounds in law, bio-chemistry or environmental engineering." ER 33.

The California court also relied on the factually weak and legally irrelevant assumption that a third African American actually sat on the jury. ER 34.

The district court basically, and in an equally conclusory way, just cited to the state court's opinion and agreed that the state court's conclusions were "reasonable, based upon the record." ER 13.[2]

At oral argument in the Ninth Circuit, the Panel asked numerous factual questions about the voir dire, the peremptory exclusion by the prosecutor of the two African American jurors, the statistical issue of the number and percentage of African American jurors that the prosecutor excluded, and about comparative juror analysis between those excluded by the prosecutor and those non-minority jurors that the prosecutor allowed to sit on the jury. Among other things, the prosecutor at oral argument stated that one of the struck jurors had negative experiences with

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prosecutor gave his explanations for striking both prospective African-American jurors. ER 50-52. Although Ms. J was discussed at greater length in the trial court, both were also certainly at issue in the Ninth Circuit appeal.

2 The district court also cited facts from the voir dire transcript that were ***not*** offered as justifications by the prosecutor. As discussed below, that is improper.

law enforcement "that had a bearing on this particular case." One Panel member responded "because of his race, right?" The prosecutor responded that the juror said that law enforcement acted in a racially motivated way. A Panel member asked if the prospective juror said he could put that aside, and judge the case fairly, why would he be pre-empted if it's not race based at that point? The prosecutor said that a different juror said something similar and was struck. A Panel member responded that the other juror, who was in a current lawsuit with the police, was different from someone who was stopped 16 years ago by the police and said he could put it aside. The prosecutor added that the excluded juror experienced law enforcement acting in a racially motivated way, here we have an African American defendant and white law enforcement, it will be hard for him to set that aside. A Panel member noted that is a common occurrence for African Americans, and it has been documented that African Americans are pulled over and questioned more by the police, so are you saying that African Americans per se would be biased whenever there is an accusation of racial profiling or things of that nature? The prosecutor said no, but it happened often to this person and he used the term "harassed." A Panel member responded that there was no record made that his experiences caused him to be biased against white police officers or law enforcement generally, that if there had been such a record it would be more persuasive, but to simply assume that the prospective juror wouldn't be objective even though he said he would be and to exercise a peremptory challenge against him when the same prosecutor did not do it against a non-African American who also felt harassed by

the police was a little "suspicious." The prosecutor argued that the struck juror said he was harassed often and even though he said he could be fair and impartial the trial prosecutor could look at that and say that even though he says he can be fair and impartial "I don't know what's gonna happen where there is an African-American defendant and white law enforcement and the testimony starts coming out and bringing out all these feelings..." A second Panel member said "sounds like you struck [or strike] him because of his race." A different Panel member immediately added "yeah." A third Panel member told the prosecutor that "I'm not sure you're helping [your case]."

The Panel also noted that the fact that 2 out of 2 or 2 out of 3 African American jurors had been struck made it even more difficult to argue that the strikes were race neutral and not pretextual.

The above summary of certain relevant portions of oral argument is taken from counsel's notes and listening to the audio tape; no official transcript of the entire oral argument exists to counsel's knowledge. However, the oral argument lasted only about 20 minutes, and can still be listened to on the Ninth Circuit's website. Respondent strongly urges that if this Court has any remaining doubts about granting certiorari, that it listen to the tape of the oral argument found at www.ca9.uscourts.gov (use "advanced search" and type in the case number, 09-15379, to call up the short audio tape). The numerous, searching, and mostly fact-based questions asked by the Panel, and the answers *and concessions* of racial discrimination in the peremptory challenges made by the prosecutor at oral

argument, will help this Court to understand the reasons for the Panel's decision.

In short, the Ninth Circuit Panel carefully examined the facts and the law, recognizing that "[i]n evaluating pretext, our precedent requires a comparative juror analysis. *See Boyd v. Newland*, 467 F.3d 1139, 1145 (9th Cir. 2006) (citing *Miller-El v. Dretke*, 545 U.S. 231 (2005))." The Panel unanimously concluded that "[t]he prosecutor's proffered race-neutral bases for peremptorily striking the two African-American jurors were not sufficient to counter the evidence of purposeful discrimination in light of the fact that two out of three prospective African-American jurors were stricken, and the record reflected different treatment of comparably situated jurors. *See Ali [v. Hickman,]* 584 F.3d [1174,] at 1180 [(9th Cir. 2009), *as amended*],(holding under similar circumstances that the California Court of Appeal's finding of no pretext was unreasonable). Therefore, we reverse the district court's denial of [Mr.] Jackson's petition for writ of habeas corpus." *Appendix A* at 2. Their decision was reasoned and almost entirely fact-based. There is no evidence whatsoever that the Panel, or the entire Ninth Circuit in unanimously denying rehearing en banc, failed to give any due deference to the state court opinion or misunderstood or ignored any aspect of federal law.

V. REASONS SUPPORTING DENIAL OF THE WRIT

A. General Considerations Governing Certiorari

The State's entire argument is that the Ninth Circuit's unpublished, non-precedential Memorandum Disposition did not give adequate deference to the lower

courts' rulings. There is no evidence whatsoever in the record to support that bald accusation. The Panel decided, after full briefing and oral argument and a thorough review of the record (including comparative juror analysis), that the state court's finding of no racial pretext in the peremptory challenges of two African-American jurors by a prosecutor in a trial of an African-American man for raping a white woman, was objectively unreasonable based on the evidence of this specific case. What the State is really complaining about is that it does not like the way the Panel wrote its unpublished Memorandum Decision. That the losing party dislikes how the opinion is written is not a basis for granting certiorari, and the State has offered no authority, and certainly no split of authority, to support its argument that it is. And every single Judge of the Ninth Circuit rejected that argument when not one Judge voted to rehear the matter en banc.

The fact that this case is unpublished and has no precedential value, and essentially turns on the specific facts of this case—and will therefore neither affect other cases nor prevent the Ninth Circuit from reaching a different conclusion on the same or similar issues in other, published cases in the future—make this case unworthy of the Supreme Court's attention. Only the parties to this case are affected, and *they* still have the option of a retrial—at the State's sole discretion—and even possibly further state court and Ninth Circuit appeals.

Moreover, Supreme Court Rule 10 states that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"—which is precisely

what the State is arguing here. The Ninth Circuit's unpublished Memorandum Decision was based in part on that Court's weighing of the *evidence* and finding that the lower court's finding of no racial pretext was unreasonable. *Appendix A* at 2. This Court seldom wastes its time on cases where the losing party simply wishes to quibble over the factual determinations of the case below—again, that is what the State is attempting here by arguing that the Ninth Circuit's alleged "factual findings" were incorrect.

Supreme Court Rule 10 also lists the primary grounds for granting a writ of certiorari—circuit splits, state-federal court splits, state-state court splits, "far depart[ures] from the accepted and usual course of judicial proceedings," or "an important question of federal law that has not been, but should be, settled by [the Supreme] Court, or has decided an important federal question in a way that conflicts with relevant decisions of [the Supreme] Court." *None* of these accurately describes the State's complaint about the Ninth Circuit's unpublished opinion, nor does it meet its burden of showing, that this petition for writ of certiorari fits into any of those categories. There simply is no lack of uniformity on issues of federal law, no conflict with other circuits, no splits of authority (other than between the Ninth Circuit's unpublished decision and the unpublished decisions of the district and intermediate state court below in the case at bar), and no conflict within the Ninth Circuit (which should be resolved by the en banc Ninth Circuit even if it existed, which the State does not demonstrate). Indeed, a review of the State's petition for writ of certiorari makes clear that what the State really wants to do is

to *rehash its factual arguments.*

As for the State's attempt to turn this into a case about what amount of "deference" is due to the state courts' rulings, that issue was not even addressed by the Ninth Circuit below—although the proper amount of deference was given.

In addition, as discussed in more detail below, this Court has recently and repeatedly denied certiorari in what the State claims are similar cases, and there is no reason to do the opposite here. And even if there were, the State itself complains about what it considers a similar case that preceded this one that it could still seek certiorari on—if it wishes to do so.

Moreover, this case is not even about "letting a rapist go." If the Ninth Circuit decision stands, the State will be able to retry him. Even if the State chooses in its discretion not to do so, he has already been in prison *since 2004—seven years*—based on a trial that the federal Court of Appeals found unconstitutional due to racial discrimination. Delay in enforcing the Court of Appeals' judgment appears to be the primary purpose of this petition.

And in any event, as discussed in more detail below, this case was correctly decided on the merits even without reference to the "issues" the State attempts to manufacture in order to get this Court's attention on certiorari.

Finally, Respondent once again urges this Court to listen to the tape of the oral argument found at www.ca9.uscourts.gov (use "advanced search" and type in the case number, 09-15379, to call up the audio tape). That tape may greatly help this Court to understand the Panel's decision.

B. The Legal Merits

In *Batson v. Kentucky*, 476 U.S. 79 (1986), the U.S. Supreme Court denounced the use of prosecutorial peremptory challenges to eliminate African American jurors because of their race as "most pernicious," and declared that such exclusions violate the equal protection clause because it "constitutes a primary example of the evil the Fourteenth Amendment was designed to cure." *Batson,* 476 U.S. at 84, 85, 88. Numerous Circuits have has held that "the Constitution forbids striking even a single prospective juror for a discriminatory purpose." *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994); *accord United States v. Battle*, 836 F.2d 1084, 1086 (8th Cir. 1987) ("under *Batson*, the striking of a single black juror for racial reasons violates the equal protection clause, even though other black jurors are seated, and even when there are valid reasons for the striking of some black jurors"); *United States v. Gordon*, 817 F.2d 1538, 1541 (11th Cir. 1987) (same).

The Batson process involves three steps: (1) a defendant must make a prima facie showing that the prosecutor challenged the juror because of membership in a cognizable group; (2) the burden then shifts to the prosecutor to put forward a group-neutral reason for challenging the juror, and (3) the court must then determine whether the defendant has established purposeful discrimination, in other words, whether the group-neutral explanation given by the prosecutor is real or pretextual. As for the *first* prong,

> To establish such a [prima facie] case, the defendant first must

> show that he is a member of a cognizable racial group, *Castaneda* v. *Partida, supra,* at 494, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. ***Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate."*** *Avery v. Georgia, 345 U.S., at 562.* Finally, the defendant must show that *these facts and any other relevant circumstances* raise *an inference* that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This *combination of factors* in the empaneling of the petit jury, as in the selection of the venire, raises the necessary *inference* of purposeful discrimination.
>
> In deciding whether the defendant has made the requisite showing, the trial court should consider *all relevant circumstances.* For example, a "pattern" of strikes against black jurors included in the particular venire might give rise to an *inference* of discrimination. Similarly, *the prosecutor's questions and statements during voir dire* examination and in exercising his challenges [regarding other jurors] may support or refute an inference of discriminatory purpose. *These examples are merely illustrative.*

Batson, 476 U.S. at 96-97 (emphasis added).

'Thus, in order to establish a prima facie case of racial discrimination in jury selection, a defendant must show that (1) the prospective juror who was removed is a member of a cognizable group, (2) the prosecution exercised a peremptory challenge to remove the juror, and (3) 'the facts *and any other relevant circumstances raise an inference*' that the challenge was motivated by race or gender." *Cooperwood v. Cambra*, 245 F.3d 1042, 1945-46 (9th Cir. 2001)(emphasis added). The first two prongs of this test could not reasonably be disputed: both of the prospective jurors and Mr. Jackson are all African American, and the prosecutor used a peremptory strike against both of those prospective jurors.

As for the third prong, the California Court of Appeal decided that because the trial court asked the prosecutor to state his reasons and determined that they were race-neutral, "the issue of the defendant's showing [of a prima facie case] is moot." ER 31. The district court similarly *assumed* that that the defendant had made a prima facie case. ER 12.

Thus, this Court can move to the next question: whether the reasons stated by the prosecutor for peremptorily striking two African American prospective jurors were in fact a pretext for discrimination.

In *Miller-El v. Dretke*, 545 U.S. 231 (2005) ("*Miller-El II*".), the Supreme Court performed a detailed comparative juror analysis, explicitly rejecting the argument that such an analysis was barred because it had not been performed in state court. *Miller-El II*, 545 U.S. at 241 n. 2. *Miller-El II* makes clear that comparative juror analysis is an appropriate tool for analyzing a prosecutor's stated reasons even where that analysis was not performed at trial. Indeed, the California Supreme Court has *assumed* that it must perform comparative juror analysis on appeal even where it had not been performed in the trial court, citing *Miller-El*. *See, e.g., People v. Ward*, 36 Cal.4th 186, 203 (2005).

In *Boyd v. Newland*, 467 F.3d 1139 (9th Cir. 2006), *cert. denied*, 127 S.Ct. 2249 (2007), the Ninth Circuit also concluded that

> Miller-El II made clear that comparative juror analysis is an important tool that courts should utilize in assessing *Batson* claims: "More powerful than these bare statistics [revealing that the prosecution struck 91% of black potential jurors], however, are side-by-side comparisons of some black venire panelists who were struck and

white panelists allowed to serve." 125 S. Ct. at 2325.

. . .

Miller-El II fits within the Batson framework, which provides that "the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose." *Batson*, 476 U.S. at 97. *Batson* itself required courts to consider the "totality of the relevant facts" and "all relevant circumstances" surrounding the peremptory strike. *Id.* at 94, 96.

. . .

There are two main ways that we could consider Petitioner's *Batson* claim in light of the "totality of the relevant facts." *Batson*, 476 U.S. at 94.....

First, we could look at percentages....We have held that, "[t]o establish a prima facie case, [a petitioner does] not need to show that the prosecution ha[s] engaged in a pattern of discriminatory strikes against more than one prospective juror" because "the Constitution forbids striking even a single prospective juror for a discriminatory purpose." *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994). Nonetheless, in some cases, courts have found it helpful to compare the number of minority prospective jurors stricken to non-minority prospective jurors stricken. *See Miller-El II*, 125 S. Ct. at 2325 (noting that "[t]he numbers describing the prosecution's use of peremptories are remarkable."); *Wade*, 202 F.3d at 1198 (reviewing the statistical evidence of the number of African-American potential jurors stricken compared to the racial makeup of the other potential jurors who were struck and of the pool at large, although noting that statistical disparities can be misleading).

. . .

Second, we could assess "all relevant circumstances," *Batson*, 476 U.S. at 96, surrounding the challenged peremptory strike by engaging in comparative juror analysis....In order to assess Petitioner's claim, we must compare the prospective juror who was stricken with the other prospective jurors who were not.

Id. at 1145-48; *accord United States v. Collins*, 551 F.3d 914 (9th Cir. 2009); *Ali v. Hickman*, 583 F.3d 1174 (9th Cir. 2009), *as amended*. The Ninth Circuit also concluded that "comparative juror analysis is an important tool that courts *should*

use on appeal." *Boyd*, 467 F.3d at 1149 (emphasis added).

Accordingly, comparative juror analysis is both appropriate and necessary.

Returning to the *Miller-El* line of cases and its progeny, the Supreme Court also identified two distinct ways of using comparative juror evidence in assessing whether a facially neutral reason is a pretext for discrimination. First, where a prosecutor's stated reasons for discharging "cognizable-class" jurors apply equally to jurors who are *not* members of the class (and who were *not* discharged), those reasons may be pretextual. *See Miller-El v. Cockrell*, 537 U.S. 322, 343 (2003)(*Miller-El I*); *see McLain v. Prunty*, 217 F.3d 1209, 1220-1221 (9th Cir. 2000). Second, where the prosecutor uses "disparate questioning" between "cognizable-class" jurors and jurors who are not members of the class, stated reasons for discharging "cognizable-class" jurors based on divergent views are pretextual. *Miller-El I*, 537 U.S. at 344 (if the "use of disparate questioning is determined by race . . . it is likely a justification for a strike based on the resulting divergent views would be pretextual").

Here, the prosecutor struck the two potential black jurors in a case where a black defendant was accused of raping a white woman. In response to defense counsel's *Batson* motion, the trial court required the prosecutor to state his reasons for the discharge. Thus, the question to be answered here is whether the prosecutor's stated reasons were pretexts for racial discrimination.

Employing the two types of comparative analysis, the answer here is "yes."

First, as to the statistical question, the prosecutor apparently struck 100% of

the African American prospective jurors. Even if, as the courts below assumed based on a completely inadequate record, he only struck 66.67% of the African Americans (2 out of 3) that is still an overwhelming percentage. Plus, as noted above, striking even a single prospective juror based on race violates *Batson* and the United States Constitution.3

Second, it is important to note that the voir dire of Mr. Smith and Ms. Johnson does not show *any objective* non-racial reason for the prosecutor to throw them off the jury. Unless the prosecutor blurts out an actual admission of discriminatory intent *prior* to making his *peremptory* challenge, all most defendants can *ever* show is *an apparent absence* of any reason to excuse the juror. As the Supreme Court noted in *Batson*, "the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" *Batson*, 476 U.S. at 96-97. Here, a prima facie case of discrimination was made. Both excluded African American jurors indicated that they would be fair and impartial. If anything, Mr. Smith, who regularly socialized with police officers, and Ms. Johnson, who previously worked on the jail staff, would appear to be excellent jurors for the prosecution. The fact that there are no apparent non-racial reasons for dismissing those two jurors itself supports the claim of discrimination.

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3 The California Court of Appeal opinion states that the prosecutor used his fifth peremptory challenge to exclude Mr. Smith from the jury and his twelfth peremptory challenge to exclude Ms. Johnson. The record appears to reflect only one peremptory challenge by the prosecution after Ms. Johnson. ART 203. It is not possible from the record to tell what other minority groups some of the other struck

The additional fact that they were either the only two African American jurors in the venire, or at most two out of three, in a trial of an African American man for raping a white woman, adds considerable additional weight to this evidence.

Moreover, as to Mr. Smith, the prosecutor explained that he had prior negative experiences with police and may still "harbor animosity" toward police. RT 78. Yet the prosecutor had *not* discharged a non-African American juror who also had prior negative experiences with police. ART 57, 95-96 (Juror No. 8).

Even putting aside the inexplicable difference in treatment between Mr. Smith and Juror 8, the record does not support the prosecutor's stated reasons. Contrary to the prosecutor's argument that Mr. Smith may still harbor animosity against police generally, Mr. Smith made clear that he did *not* "judge all police officers by the behavior of one." He said he would "judge each [witness] on their own credibility,*id.,* and that he had "a lot of friends and former students . . . in law enforcement." He socialized with retired police officers on a regular basis. ART 100.

As to Ms. Johnson, the prosecutor said that he struck her because she had a master's degree in social work. RT 78. But the prosecutor did not ask Ms. Johnson a single question about her degree. The prosecutor had, however, questioned several non-African American jurors about their educational and occupational backgrounds, allowing them to explain how their backgrounds would or would not affect them as jurors. ART 174-175 (prosecutor questions prospective juror on undergraduate degree in bio-chemistry, graduate degree in environmental

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jurors may have been members of.

engineering); 196-198 (prosecutor questions prospective juror on law degree and position at public defender's office); 198-199 (prosecutor questions seated juror on law degree and occupation as attorney). "The differences in the questions posed by the prosecutors are some evidence of purposeful discrimination." *Miller-El v. Cockrell*, 537 U.S. at 344.

Counsel must point out that the state court referred to (but did not rely on) other facts, such as prospective juror Smith's occupation as a postal worker, experiences of his relatives and friends with law enforcement, and demeanor in answering one question, that the prosecutor did *not* list as one of the reasons for striking him from the jury. Similar facts were referred to (but again not relied on) by the state court about prospective juror Johnson's acquaintances who had experience with the criminal justice system. And still other such facts were cited in the State's Petition for Writ of Certiorari concerning both Juror S and Juror J at pages 2-3 of its Petition. The district court repeated some of these facts, and unlike the state court, appeared to rely on them. ER 11. This was improper.

Courts cannot speak for the trial deputy who made the peremptory challenge. Once defense counsel met his burden of showing a prima facie case of discrimination against two prospective African American jurors who had been *peremptorily* challenged, the burden shifted and the *deputy district attorney* was required to state why *he* struck those jurors. The reviewing courts' efforts to come up with reasons why the prosecutor *might* have challenged the two jurors amounts to saying that the entire universe of speculative reasons can be employed to justify

his actions, whether they came out of his mind or mouth or not, and if either the trial or appellate courts can conjure *any* non-racial reason, that will be good enough to prove that *the deputy making the challenge* was not motivated by racial bias. This would confound the entire purpose of the burden-shifting mechanism established by the Supreme Court in *Batson*.

In *Johnson v. California*, 545 U.S. 162 (2005), the Supreme Court reaffirmed that reviewing courts must base their decisions about the racial motivations of the prosecutor on the explanations the prosecutor actually gave, *not* on speculation of what the prosecutor *may* have based his peremptory challenge on:

> The Batson framework is designed to produce *actual* answers to suspicions and inferences that discrimination may have infected the jury selection process. See 476 U.S., at 97-98, and n. 20. The inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question. See Paulino v. Castro, 371 F.3d 1083, 1090 (CA9 2004)("[I]t does not matter that the prosecutor might have had good reasons...[w]hat matters is the real reason they were stricken" (emphasis deleted); Holloway v. Horn, 355 F.3d 707, 725 (CA3 2004)(speculation "does not aid our inquiry into the reasons the prosecutor actually harbored" for a peremptory strike)....
>
> The disagreements among the state court judges who reviewed the record in this case illustrate the imprecision of relying on judicial speculation to resolve plausible claims of discrimination.

Johnson, 545 U.S. at 172-73 (emphasis added).

In *Paulino v. Castro*, 371 F.3d 1083 (9th Cir. 2004), the Ninth Circuit also criticized offering speculation as to why the prosecutor challenged a juror, holding that under *Batson* "it does not matter that the prosecutor might have had good reasons to strike the prospective jurors. What matters is the *real* reason they were

stricken"—reasons that must be provided by the prosecutor. *Id.* at 1089-90.

Thus, the law is clear that any extraneous "facts" that were not offered by the trial prosecutor as reasons for his peremptory challenges are irrelevant and may not be considered in determining whether the challenges were proper.

In short, in a trial of an African American man for raping a white woman, the prosecutor did not want African Americans on the jury, and he used his peremptory challenge to get rid of all or almost all of them. His stated reasons for both strikes were hollow and pretextual, and were either unsupported by the record, equally applicable to non-African American jurors that the prosecutor allowed to sit on the jury, the result of disparate questioning, or a combination of the three. The state court's decision was therefore contrary to, and involved an unreasonable interpretation of, clearly established Supreme Court law, and that resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. The Ninth Circuit was correct to grant habeas relief.

Once again, the Ninth Circuit Panel carefully examined the facts and the law, recognizing that "[i]n evaluating pretext, our precedent requires a comparative juror analysis. *See Boyd v. Newland*, 467 F.3d 1139, 1145 (9th Cir. 2006) (citing *Miller-El v. Dretke*, 545 U.S. 231 (2005))." The Panel unanimously concluded that "[t]he prosecutor's proffered race-neutral bases for peremptorily striking the two African-American jurors were not sufficient to counter the evidence of purposeful discrimination in light of the fact that two out of three prospective African-

American jurors were stricken, and the record reflected different treatment of comparably situated jurors. *See Ali [v. Hickman,]* 584 F.3d [1174,] at 1180 [(9th Cir. 2009), *as amended*],(holding under similar circumstances that the California Court of Appeal's finding of no pretext was unreasonable). Therefore, we reverse the district court's denial of [Mr.] Jackson's petition for writ of habeas corpus." *Appendix A* at 2. Their decision was reasoned and almost entirely fact-based. There is no evidence whatsoever that the Panel, or the entire Ninth Circuit in unanimously denying rehearing en banc, failed to give any due deference to the state court opinion or misunderstood or ignored any aspect of federal law.

What this Petition comes down to is that the State did not like the result, and is therefore complaining about the way the unpublished, non-precedential Memorandum Disposition was written. Why, complains the State, didn't the Ninth Circuit gives us a longer list of obviously weak reasons that we could use to attack the ruling in the Supreme Court? Why didn't it give the state court its due deference—which the State defines as *always* agreeing with the state courts? Yet the State offers not a single case that says the Court of Appeals must give them a list of straw men to knock down on further appeal or that says "deference" is a synonym for "rubber stamp." Why, oh why, the State asks, in the age of AEDPA, is it *still possible* for the federal courts to grant habeas relief on rare occasions? Hasn't the Great Writ been effectively done away with? Won't the Supreme Court please review *de novo* the alleged "factual findings" that were the basis for the Ninth Circuit's decision?

Actually, of course, under AEDPA the Ninth Circuit does not make "factual findings," it decides whether the state court proceedings "(1) resulted in a decision that was contrary to, *or* involved an unreasonable interpretation of, clearly established Federal law, as determined by the Supreme Court of the United States; *or* (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d) (emphasis added). This statute provides *three separate and alternative grounds* for federal habeas relief. *See, e.g., Williams v. Taylor*, 120 S.Ct. 1495, 1509 (2000). The "unreasonable application" requirement, for example, is met if the state court "identifies the correct governing legal principle from the [U.S. Supreme Court's] decisions but unreasonably applies that principle to the facts of the [particular] prisoner's case." *Williams*, 120 S.Ct. at 1520, 1521, 1523. This inquiry requires the federal court "to ask whether the state court's application of clearly established federal law was *objectively* unreasonable." *Williams*, 120 S. Ct. at 1521 (emphasis added). The Ninth Circuit did its job under AEDPA, nothing more and nothing less. This Court should not waste its time reconsidering whether the Ninth Circuit read and interpreted the factual record in an unpublished case correctly.

The State criticizes the Ninth Circuit's citation to one of its prior cases, *Ali v. Hickman*, 584 F.3d 1174 (9th Cir.), *as amended*, 571 F.3d 902 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 1065 (2010), by pointing out that a petition for certiorari was filed in that case and the State argued to this Court that it was wrongly decided. What the State fails to point out is that this Court *denied* the petition for writ of

certiorari. *Cate v. Ali*, 130 S. Ct. 2065 (2010).

The State's citation to *Rice v. Collins*, 546 U.S. 333 (2006), is equally unavailing. The Ninth Circuit in the case at bar did not "rely merely on debatable inferences from the record as a basis for rejecting state court findings of fact." Petition at 13. The case at bar concerned a very different set of facts which, in light of the record below *and* in light of the statements and admissions by the prosecutor at oral argument (see above), compelled the conclusion that there was no permissible alternative but to reject the trial prosecutor's race-neutral justifications and conclude that a *Batson* violation had occurred.4 The Ninth Circuit properly stated the relevant rules of law; this Court does not grant certiorari when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. Supreme Court Rule 10. (Of course, there was no "error" here in the first place). Nor do any of the other grounds for granting certiorari stated in Supreme Court Rule 10 apply here.

Finally, the State seeks to portray the Ninth Circuit as running amok with numerous recent decisions improperly finding *Batson* error even though the presumably infallible state courts did not. Two of those three other cases, *Ali v. Hickman* and *Rivera v. Nibco,* were brought to this Court's attention by the State, which *denied* certiorari. *See Ali v. Hickman*, 584 F.3d 1174 (9th Cir.), *as amended*, 571 F.3d 902 (9th Cir. 2009), *cert. denied,* 130 S. Ct. 1065 (2010), and the

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4 Again, this Court should ignore arguments based on "facts" about the prospective jurors that the trial prosecutor himself did not give as a basis for his peremptory strikes, such as those repeated at page 13 of the Petition. *Johnson v. California*,

unpublished decision of *Rivera v. Nibco*, 372 Fed. Appx. 757 (9th Cir. 2010), *cert. denied*, 2011 U.S. LEXIS 402 (Jan. 10, 2011). The third case complained about by the State is another unpublished Memorandum Decision where rehearing and rehearing en banc was denied and no cert petition has been filed to date (although the State could still do so). By listing its very few losses, the State comes across as a sore loser, but does nothing to advance its argument that the case at bar meets *any* of the standards for this Court to grant certiorari on an unpublished, non-precedential Memorandum Decision where the State simply wishes to reargue the facts. The only result of granting certiorari in this case would be to greatly increase the workload of the various Courts of Appeals by forcing them to write lengthier opinions in routine, unpublished cases, and of this Court by giving the State more chances to seek certiorari every time they lose. Of course, if that is required of the very few appellate cases that *grant* habeas relief, it must also be required of the infinitely greater number of appellate cases that *deny* habeas relief.

VI. CONCLUSION

For the foregoing reasons, Mr. Jackson respectfully asks this Court to deny this Petition for Writ of Certiorari.

Dated: January 13, 2011

Respectfully submitted,

MARK D. EIBERT
Counsel of record for Respondent
STEVEN FRANK JACKSON

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545 U.S. 162 (2005); *Paulino v. Castro*, 371 F.3d 1083 (9th Cir. 2004).

APPENDIX A

UNPUBLISHED MEMORANDUM OPINION OF THE NINTH CIRCUIT COURT OF APPEALS

JULY 23, 2010

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STEVEN FRANK JACKSON, Petitioner - Appellant, v. T. FELKNER, Respondent - Appellee.	No. 09-15379 D.C. No. 2:07-cv-00555-RJB MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Robert J. Bryan, District Judge, Presiding

Argued and Submitted April 15, 2010
San Francisco, California

Before: SCHROEDER and RAWLINSON, Circuit Judges, and COLLINS, District Judge.**

Appellant Steven Frank Jackson (Jackson) appeals the district court's denial of his petition for a writ of habeas corpus, contending that the prosecutor's peremptory challenges excusing two African-American jurors violated his rights

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable Raner C. Collins, United States District Judge for the District of Arizona, sitting by designation.

under the Sixth and Fourteenth Amendments. Because Jackson filed his habeas petition after 1996, his claim is governed by the Antiterrorism and Effective Death Penalty Act (AEDPA). *See Byrd v. Lewis*, 566 F.3d 855, 859 (9th Cir. 2009).

"Under AEDPA, [Jackson's] petition can be granted only if the state court determination resolving his claim was contrary to, or involved an unreasonable application of, clearly established Federal law . . ." *Id.* (citation and internal quotation marks omitted). It is clearly established federal law that the Equal Protection Clause prohibits the prosecutor from challenging prospective jurors solely on the basis of race. *See Batson v. Kentucky*, 476 U.S. 79, 89 (1986); *see also Ali v. Hickman*, 584 F.3d 1174, 1180 (9th Cir. 2009), *as amended*. "A *Batson* challenge has three steps: first, the defendant must make a prima facie showing that a challenge was based on race; second, the prosecution must offer a race-neutral basis for the challenge; and third, the court must determine whether the defendant has shown purposeful discrimination." *Cook v. Lamarque*, 593 F.3d 810, 814 (9th Cir. 2010) (citations and internal quotation marks omitted). In evaluating pretext, our precedent requires a comparative juror analysis. *See Boyd v. Newland*, 467 F.3d 1139, 1145 (9th Cir. 2006) (citing *Miller-El v. Dretke*, 545 U.S. 231 (2005)).

The prosecutor's proffered race-neutral bases for peremptorily striking the two African-American jurors were not sufficient to counter the evidence of purposeful discrimination in light of the fact that two out of three prospective African-American jurors were stricken, and the record reflected different treatment of comparably situated jurors. *See Ali*, 584 F.3d at 1182 (holding under similar circumstances that the California Court of Appeal's finding of no pretext was unreasonable). Therefore, we reverse the district court's denial of Jackson's petition for writ of habeas corpus.

REVERSED and REMANDED.

APPENDIX B

NINTH CIRCUIT ORDER DENYING STATE'S PETITION FOR PANEL REHERAING AND REHEARING EN BANC SEPTEMBER 3, 2010

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STEVEN FRANK JACKSON,

Petitioner - Appellant,

v.

T. FELKNER,

Respondent - Appellee.

No. 09-15379

D.C. No. 2:07-cv-00555-RJB
Eastern District of California,
Sacramento

ORDER

Before: SCHROEDER and RAWLINSON, Circuit Judges, and COLLINS, District Judge.*

The panel has voted to deny the Petition for Rehearing. Judges Schroeder and Rawlinson voted, and Judge Collins recommended, to reject the Suggestion for Rehearing En Banc.

The full court has been advised of the Suggestion for Rehearing En Banc, and no judge of the court has requested a vote.

Appellee's Petition for Rehearing with Suggestion for Rehearing En Banc filed on August 4, 2010, is DENIED.